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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-841

BUFORD BAILEY and KAROLINE L. BAILEY, His Wife,
Appellants,

v.

DOROTHY PENNINGTON,
Appellee.

On Appeal From the Supreme Court of Delaware.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

MASON E. TURNER, JR.,
ROBERT G. CAREY,
PRICKETT, SANDERS, JONES, ELLIOTT & KRISTOL,
1310 King Street,
P. O. Box 1328,
Wilmington, Delaware. 19899
Attorneys for Appellee.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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IN THE

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OCTOBER TERM, 1979.

No. 79-841.

BUFORD BAILEY and
KAROLINE L. BAILEY, his wife,
Appellants,

v.

DOROTHY PENNINGTON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF DELAWARE.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The Appellee moves the Court, pursuant to Supreme Court Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware entered on August 31, 1979, on the ground that the question on which the decision depends does not present a substantial Federal question.

OPINION BELOW.

The opinion of the Supreme Court of Delaware is reported at 406 A. 2d 44 and is set forth in the Appellants' Appendix at p. 5a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Fourteenth Amendment to the Constitution of the United States:

> ". . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves Delaware's "Premises Guest Statute" [1], 59 *Del. Laws* Ch. 171, § 1 (1973), codified at 25 *Del. C.* § 1501, which reads:

> "No person who enters onto the premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others."

QUESTION PRESENTED.

Whether 25 *Del. C.* § 1501, which is a codification of the traditional common law that a person's status determines the duty owed to him by a landowner, violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States?

1. Throughout this brief the statute will be referred to as the "premise's" or "landowner's" guest statute. The formal title is "Liability of Owners or Occupiers of Land for Injury to Guests or Trespassers." 25 *Del. C.* § 1501.

STATEMENT OF THE CASE.

On August 9, 1975, the Appellant, Buford Bailey, was Appellee's guest at her home on Smithville Road, Newark, Delaware. Appellee had invited about 50 guests for a "corn roast". Four insect repellent torches were placed about the Apellee's property to ward off bugs and insects. The torches consisted of a stick, with a plastic cup at the top in which sat a metal cup containing burning lamp oil.

At a time during the corn roast, one torch was moved nearer the picnic table. In some manner, that burning insect repellent torch fell, or was knocked over, onto the Appellant. Mr. Bailey claims that he sustained certain injuries as a result of the ensuing fire.

Based on those facts, the Appellants filed a complaint on February 4, 1976, alleging that the Appellee was negligent in certain respects.

On February 27, 1976, the Appellee moved to dismiss the Complaint under Rule 12(b)(6) [2] for failure to state a claim upon which relief may be granted. The motion was based on Delaware's Premises Guest Statute, 25 *Del. C.* § 1501. On presentation of the motion, an Order was entered by the Delaware Superior Court dismissing the complaint but permitting the Appellants to file an amended complaint no later than March 12, 1976.

Appellants timely complied with the Order of the Court and, on or about March 9, 1976, filed an amended complaint alleging that the Appellee was wantonly negligent.[3]

2. Del. R. Civ. Proc. 12(b)(6). Delaware adopted the Federal Rules of Civil Procedure in 1948.

3. Appellants also continued to assert a claim based on negligence by claiming they were not "guests without payment" because they had conferred a benefit upon the Appellee by bringing a bottle of liquor to the corn roast. Appellants' Appendix, pp. 8a and 29a.

The Appellee asserted in her answer, as an affirmative defense, the Premises Guest Statute, 25 *Del. C.* § 1501, and thereafter moved for summary judgment.[4] The Delaware Superior Court granted defendant's motion for summary judgment.[5] An appeal was perfected to the Delaware Supreme Court which affirmed the lower Court under the rationale of *Justice v. Gatchell.*[6] This appeal followed.

4. Del. R. Civ. Proc. 56. During the course of briefing the motion for summary judgment below, the Appellants filed a product liability action against the manufacturer and seller of the torches, which action is still in the discovery stages. *Bailey v. Sears, Roebuck & Co.*, Civil Action No. 77C-AU-26, Superior Court of the State of Delaware in and for New Castle County. Cf. Appellants' Jurisdictional Statement, p. 16, in which they state that if 25 *Del. C.* § 1501 is constitutional, "there will be no alternative remedies available to" them.

5. Appellants' Appendix, p. 24a.

6. *Bailey v. Pennington*, Del. Supr., 406 A. 2d 44 (1979); *Justice v. Gatchell*, Del. Supr., 325 A. 2d 97 (1974).

ARGUMENT.

The Appeal Should Be Dismissed or Summarily Affirmed Because It Fails to Present a Substantial Federal Question.

A. The Appellants Have Assumed a Heavy Burden in Seeking to Have Legislation Enacted by the General Assembly of the State of Delaware Declared Unconstitutional.

The police power of the State of Delaware is vested in its General Assembly which, within constitutional limits, is the sole judge as to when and how the police power[7] of Delaware is to be exercised for the protection and welfare of Delawareans. A proper legislative determination as to the necessary exercise of that police power and the method to be employed is conclusive upon the courts.[8]

In *Williamson v. Lee Optical Co. of Oklahoma*,[9] this Court, with respect to equal protection, said:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think.[10]

Courts must not arrogate to themselves legislative power and authority to determine statutes unconstitutional by

7. See 16 Am. Jur. 2d, *Constitutional Law* §§ 259, et seq.

8. *Silver v. Silver*, Conn., 143 A. 240, 65 A. L. R. 943, aff'd 280 U. S. 117 (1929); *Clendaniel v. Conrad*, Del. Supr., 83 A. 1036, error dismissed 235 U. S. 712 (1929).

9. 348 U. S. 483 (1955).

10. Id. at 489. See also *Dandridge v. Williams*, 397 U. S. 471, 485 (1970).

"modern" standards under "present day" conditions in an over-zealous effort to effect perceived long-overdue reform.[11] Nor is it necessary that the Court agree that the statute is a wise, sound and appropriate public policy.[12] The primary function and responsibility of Delaware's General Assembly is, in its wisdom, to weigh and determine the desirability of legislation affecting the social, economic and political policy of the State.

In challenging Delaware's premise's guest statute, the Appellants have assumed a heavy burden.[13] Every legislative act is presumptively constitutional, and any question of its validity must be resolved in favor of the statute, especially where the alleged discrimination is not based on race, color, religion, ancestry or financial position.[14]

The creation of distinct classifications of persons is not denied the legislature by the equal protection clause [15] and a scheme of classification is permissible if any state of facts can be conceived reasonably to sustain it.[16]

In short, it is settled that a statute must be held valid if it is possible for the Court to do so; every presumption must be resolved in favor of the statute's validity; and the Court must not be concerned with the wisdom of the object the General Assembly of the State of Delaware sought to accomplish.[17]

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11. *Keasling v. Thompson,* 217 N. W. 2d 687 (Iowa 1974). See also "Judicial Nullification of Guest Statutes", 40 S. Cal. L. Rev. 884 (1968).

12. *McGowan v. Maryland,* 366 U. S. 420 (1961).

13. *Keasling v. Thompson, supra.*

14. *Allied Stores of Ohio v. Bowers,* 358 U. S. 522 (1959).

15. *Reed v. Reed,* 404 U. S. 71 (1971).

16. *Allied Stores of Ohio v. Bowers, supra.*

17. See *Gallegher v. Davis,* Del. Supr., 183 A. 620 (1936).

B. Delaware's Premises Guest Statute Is a Legislative Codification of the Traditional Common Law and a Proper Exercise of the Police Power by the General Assembly of the State of Delaware.

Appellants on this appeal urge the Court to declare Delaware's Landowner's Guest Statute an unconstitutional denial of due process and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. In fact, Delaware's Premises Guest Statute is constitutional under the "new equal protection" [18], the "traditional equal protection" [19], or the "strict scrutiny" [20] tests.

Appellants assert that 25 *Del. C.* § 1501 is a "derogation of the common law rule generally allowing recovery for injuries incurred from the negligent conduct of another, guaranteed by the Federal Constitution".[21] Appellants also urge that *"Pritchard* [22] and *Gibbes* [23] suggest that a state statute which deprives a common law right of action can withstand due process attack *only* if there is some other form of remedy available to the injured party." [24]

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18. *Frontiero v. Richardson,* 411 U. S. 677 (1973).

19. Id. *McGowan v. Maryland, supra.*

20. *Reed v. Reed, supra.*

21. Appellants' Jurisdictional Statement at p. 13.

22. *Pritchard v. Norton,* 106 U. S. 124 (1882).

23. *Gibbes v. Zimmerman,* 290 U. S. 326 (1933).

24. Appellants' Jurisdictional Statement, p. 16—Emphasis in the original. See also p. 26. But cf. p. 9, where appellants state that they contended on appeal to the Delaware Supreme Court that "the common law status classifications codified in 25 *Del. C.* § 1501" deprived them of due process.

Briefly stated, the answer to Appellants' contentions is that 25 *Del. C.* § 1501 is not in derogation of the common law; it is a codification of the common law. The statute is not an absolute bar to recovery. The proof required of, for example, a licensee who sues a landowner "is a legislative reflection of the traditional statements of the common law duty owed by property owners . . .".[25]

The statute does not involve a legislative modification of the nature and extent of a landowner's duty,[26] nor the "creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object." [27] Moreover, in enacting the Premises Guest Statute, the Delaware General Assembly did "not abolish the common law right of action to recover damages for negligent injury without substituting another substantially adequate remedy . . .".[28]

In *Snyder v. I. Jay Realty Co.*,[29] the Court stated that the

> . . . historically based view of common law [is] that the duty owed by an occupier of land to third persons coming thereon is determined according to the status of such third person, i.e., invitee, licensee or trespasser. Indeed, the ascertainment of that status is an essential preliminary to the application of the particular standard of care to be exercised by the land occupier. (Citations omitted). These common law classifications are sufficiently flexible to fulfill the purposes of our legal system in serving the needs of present day society.[30]

25. *Acton v. Wilmington & N. R. R. Co.*, Del. Supr., 407 A. 2d 204 (1979) (No. 229, 1978), see Appellants' Appendix, pp. 1-5.

26. *Acton v. Wilmington & N. R. R. Co., supra; Gallegher v. Davis, supra; New York Cent. R. Co. v. White*, 243 U. S. 188 (1917).

27. *Silver v. Silver*, 280 U. S. 117, 122 (1929).

28. *Gallegher v. Davis, supra* at 625.

29. 30 N. J. 303, 153 A. 2d 1 (1959).

25 *Del. C.* § 1501 is nothing more than the legislative recognition of the traditional common law tort doctrine that the status of a person determines the duty owed to him by the owner or occupier of land.

Delaware is not unique in this area. Twenty-eight [31] states have enacted legislation codifying the common law as it related to specified landowners. The constitutionality of the Illinois statute was upheld in *Heider v. Michigan Sugar Company.*[32]

The preamble to the New Hampshire statute states that its purpose is expressly "to codify the common law, in respect to the duty of care owed by landowners toward others who may be on their premises for sporting and recreational purposes and not for purposes connected with the landowner's own business." [33]

With respect to a similar Wisconsin statute, the Court in *Copeland v. Larson*, said that it "must be considered as a special reversal or exemption to this tendency [to enlarge the duty of landowners and minimize the distinction between licensees and invitees and is] based upon a special public policy." [34]

30. 153 A. 2d at 5. See also *Caroff v. Liberty Lumber Co.*, 146 N. J. Super. 353, 369 A. 2d 983, 985 (1977).

31. See *Copeland v. Larson*, 46 Wis. 2d 337, 174 N. W. 2d 745, 749-750, n. 4 (1970).

32. 375 Mich. 490, 134 N. W. 2d 637, cert. granted 303 U. S. 905, cert. denied 385 U. S. 362 (1966).

33. N. H. Rev. Stat. Ann. § 212-34 (1964). See also *Copeland v. Larson, supra* at 749. Alabama's statute has a similar preamble; Acts of Ala. 1965, p. 663, § 35-15-4 et seq. (Code 1975). See *Wright v. Alabama Power Co.*, 355 S. 2d 322 (Ala. 1978).

34. *Copeland v. Larson, supra* at 749.

Delaware's neighboring state, New Jersey, has enacted the "Landowner's Liability Act." [35] In *O'Connell v. Forrest Hill Field Club*,[36] the Court also said that the Act "must be considered an exemption to the growing tendency of the Court to enlarge the landowner's duty in respect to negligence." [37]

Delaware's Premises Guest Statute does not contain a preamble.[38] Nonetheless, it is reasonable to assume that the Delaware General Assembly, aware of the new approach evidenced by *Rowland*,[39] specifically rejected that trend by codifying the traditional distinctions [40] between invitees, licensees and trespassers.[41]

Accordingly, *Smith v. Arbaugh's Restaurant, Inc.*,[42] and the other cases cited by Appellants as authority for the "strong trend" [43] to abolish the common law distinctions are not applicable to the case at bar. Chief Judge Bazelon said that the "classifications . . . are judicial

35. N. J. S. A., 2A: 42A-1 et seq.

36. 119 N. J. Super. 317, 291 A. 2d 386 (1972).

37. Id. at 388. See also *Odar v. Chase Manhattan Bank*, 138 N. J. Super. 464, 351 A. 2d 389 (App. Div. 1976).

38. See 59 *Del. Laws*, Ch. 171, § 1 (1973).

39. *Rowland v. Christian*, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561, 32 A. L. R. 3d 496 (1968).

40. Distinctions are made in areas of the law other than in tort arena. Guest statutes distinguish between guests and non-guests. The Statute of Frauds distinguishes between oral and written contracts. An oral contract which cannot be performed within one year is unenforceable. That same contract reduced to writing is enforceable. See 6 *Del. C.* § 2714; *Justice v. Gatchell*, *supra*, p. 103, n. 10. Statutes of limitations arbitrarily deny equal treatment to those who fail by hours or a few days to perfect claims within the prescribed periods. See e.g., 10 *Del. C.* §§ 8106-8119.

41. 25 *Del. C.* § 1501 added the category of trespassers in 1973 on repeal of the predecessor statute, 25 *Del. C.* § 1421.

42. 469 F. 2d 97 (D. C. Cir. 1972). Appellants' Jurisdictional Statement, p. 22.

43. Appellants' Jurisdictional Statement, p. 24.

creations which should be cast aside . . .".[44] But he first made clear that the Court could only abolish judge-made rules, and only "in the absence of legislative action to the contrary . . .".[45] It cannot be said that there has not been legislative action to the contrary in Delaware.

Delaware is a common law state.[46] The English common law which existed when the State came into being remains in force until changed by the Delaware General Assembly.[47] Repeal of common law rights and duties is not favored and will be strictly construed.[48] The legislature is presumed to know the common law when it has under consideration legislation for enactment into law.[49] Delaware's Premises Guest Statute "clearly reflects the legislative intent to codify the common law." [50] "(C)onsequently the repeal of a statute even though declaratory of it, revives the common law as it was before the statute." [51]

For those reasons, this Court should reject Appellants' argument that Delaware's Premises Guest Statute is an unconstitutional denial of the equal protection guarantee of the Fourteenth Amendment. To do otherwise, would merely revive [52] the same common law in Delaware.

44. *Smith v. Arbaugh's Restaurant*, *supra* at 105.

45. Id. at 102.

46. *Makin v. Mack*, Del. Ch., 336 A. 2d 230 (1975). *Fields v. Synthetic Ropes, Inc.*, Del. Super., 221 A. 2d 617 (1965).

47. *Makin v. Mack*, *supra*. *Shellhorn & Hill, Inc. v. State*, Del. Supr., 187 A. 2d 71 (1962).

48. *Cohen v. Krigstein*, Del. Super., 114 A. 2d 225 (1955).

49. *Makin v. Mack*, *supra*.

50. *Acton v. Wilmington & N. R. R. Co.*, *supra*.

51. *Makin v. Mack*, *supra* at 234. 2A Sands, Sutherland Statutory Construction (4th Ed. 1972) § 50.05.

52. *Acton v. Wilmington N. R. R. Co.*, *supra*. See also *DiSabatino Bros., Inc. v. Baio*, Del. Supr., 366 A. 2d 508, 510 (1976); *Restatement (Second) of Torts*, §§ 341, 341A, 342 (1965).

This section of the brief shows that Delaware's Premises Guest Statute is not unconstitutional and, therefore, the Court need not consider Appellants' further argument which has its basis in *Brown v. Merlo* and the diverse opinions on, and confusion over, the constitutionality of automobile guest statutes. Automobile guest statutes have a different genesis, do not arise out of the common law, and are not before the Court.

C. Rowland, Merlo and Kermarec Are Not Authority to Declare Delaware's Premises Guest Statute Unconstitutional.

Appellants cite *Rowland* [53], *Merlo* [54] and *Kermarec* [55] as their authority for having the Court declare the Delaware statute unconstitutional and, in so doing, they castigate *Silver* [56] as being outmoded for today's society.

In *Rowland*, the California Supreme Court nullified the judge-made traditional doctrine between invitees and licensees. *Merlo*, based in part on the authority of *Rowland*, declared California's Automobile Guest Statute unconstitutional. *Silver*, of course, is the early decision of this Court upholding the constitutionality of Connecticut's Automobile Guest Statute. This Court in *Kermarec* declined to adopt the common law landowner concepts of differing status as they might have been applied in an admiralty matter.[57]

53. *Rowland v. Christian*, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P. 2d 561, 32 A. L. R. 3d 496 (1968).

54. *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 66 A. L. R. 3d 505, 506 P. 2d 212 (1973).

55. *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625 (1959).

56. *Silver v. Silver, supra.*

57. Under the U. S. Constitution, judicial power in "all cases of admiralty and maritime jurisdiction" is given to the Federal Courts. U. S. CONST., art. 3, § 2. See also Judiciary Act of 1789; the present applicable section is 28 U. S. C. A. § 1333.

The *Rowland* Court made clear that it was dealing with judicially created common law classifications which were capable of being cast aside by subsequent judicial action when they were deemed no longer to serve any useful purpose.[58] As a matter of fact, the *Rowland* Court cited this Court's decision in *Kermarec* in abandoning the traditional common law rules.[59]

In these decisions, the California Supreme Court abandoned a common law doctrine on the authority that this Court declined to extend the application of that doctrine to a new field, and the California Supreme Court used its earlier decision as authority for declaring its Automobile Guest Statute unconstitutional, notwithstanding the fact that this Court upheld the constitutionality of a similar automobile guest statute many years before.

It has been observed [60] that *Rowland* is prima facie distinguishable in jurisdictions without statutory provisions equivalent to § 1714 [61] of the California Code, although the real basis was judicial dissatisfaction with its perceived unfair, and unworkable, common law system.

When *Rowland* obliterated the traditional distinction between invitees and licensees, only California's automobile guest was denied the standard of ordinary care by his host. The *Merlo* Court placed considerable significance on the *Rowland* abandonment and said that it was as unreasonable to single out the automobile guest as it

58. With respect to whether legislative action is necessary to change a judge-made rule of long standing, see *Anno:* 25 A. L. R. 2d at 44 (1952).

59. *Rowland v. Christian, supra* at 566.

60. 44 N. Y. U. L. Rev. 426 (1969).

61. § 1714. "Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought injury upon himself . . .".

was to lower the standard of care owed a visitor on private property. Accordingly, and notwithstanding the blatant undistributed middle, the Court held that California's Automobile Guest Statute resulted in an impermissible classification and therefore invidious discriminatory treatment.

Appellants' reasoning that the Delaware's Premises Guest Statute is unconstitutional because the Delaware Supreme Court upheld its constitutionality by analogizing it to Delaware's Automobile Guest Statute ignores the fact that Delaware has not abolished the common law, and that *Merlo* is not a decision of this Court.

Merlo may be a logical consequence so far as California is concerned in light of its *Rowland* determination to abandon the traditional tort doctrine that the status of a person determines the duty owed him by a landowner. The distinctions between invitees, business visitors, licensees, social guests and trespassers have not only been preserved in Delaware, they have been codified.[62] Accordingly, *Merlo* is not authority to strike Delaware's Premises Guest Statute by first striking down Delaware's Automobile Guest Statute. The *Merlo* Court construed a statute of the State of California.

In 1936, the Delaware Supreme Court held [63] that its Automobile Guest Statute was constitutional and that neither the Delaware nor the United States Constitutions forbade the General Assembly, either expressly or by necessary implication, from measuring the degree of care [64]

62. Admittedly, England, the homeland of the common law, has discarded these distinctions. See *Occupier Liability Act*, 1957, 5 and 6 Eliz. 2, c. 31. *The Restatement (Second) of Torts* (1965), however, still distinguishes between trespassers, licensees, gratuitous licensees and invitees. See §§ 329, et seq.

63. *Gallegher v. Davis, supra.*

64. In the earlier case of *Coleman v. Rhodes*, Del. Supr., 159 A. 649 (1932), the Delaware Supreme Court declared the pre-

to be afforded by an owner or operator of an automobile to a gratuitous passenger, and that the statute was a proper exercise of the police power of the State of Delaware.[65] *Gallegher* was reaffirmed by the Delaware Supreme Court nearly 40 years later in 1974,[66] by a specific rejection of the *Merlo* rationale.

The Court in *Gallegher* discussed the cases from other jurisdictions, including *Silver*. This Court in *Silver* held that the Connecticut Guest Statute, similar to that of Delaware, was constitutional and did not deny the guest equal protection of the laws under the Fourteenth Amendment. This Court said:

> We need not * * * elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object.[67]

D. Merlo's Mixed Reviews.

Appellants rely heavily on *Merlo*. The *Merlo* decision appeared in February 1973. In the ensuing six years, *Merlo* has played to mixed judicial reviews.

In September 1973, the Court of Civil Appeals of Texas considered [68]—and rejected—*Merlo*. Justice Guittard, speaking for a unanimous court, concluded his opinion by saying:

64. (Cont'd.)
decessor automobile guest statute unconstitutional because it prohibited the maintenance of an action by a guest under any set of circumstances.

65. Since *Gallegher*, the statute was amended by 47 *Del. Laws*, Chapter 47(a) to include boats, airplanes and other vehicles, in addition to motor vehicles.

66. *Justice v. Gatchell*, Del. Supr., 325 A. 2d 97 (1974).

67. *Silver v. Silver, supra* at p. 122.

68. *Tisko v. Harrison*, 500 S. W. 2d 565 (Tex. Civ. App. 1973).

> The equal protection clause of the Fourteenth Amendment and the "equal rights" clause of the Texas Constitution do not authorize courts to encroach on the Legislature's area by exalting their own views on the wisdom of legislation to the rank of constitutional principles or by imposing standards so rigorous as to leave no tolerance for the imperfections inherent in political processes. Courts should accept legislative classifications as valid unless invidious discrimination is clearly demonstrated.[69]

In March 1974, Justice Prager of the Supreme Court of Kansas said about *Merlo*: "We are impressed with the sound rationale of the opinion . . . ." [70] But three of his brother Justices dissented with Justice Kaul saying, in his dissenting opinion, that the Kansas Court, relying on *Merlo,* had "judicially abolished the statute rather than waiting for the Legislature to act" [71]; that he believed "the Legislature is the proper forum for determination of the issue" [72]; and that "the Act poses a question steeped with social implications . . . more appropriate for legislative solution than judicial determination." [73]

Also in March 1974, Chief Justice Callister, speaking for a unanimous Supreme Court of Utah, first referred to an annotation that identified "a viewpoint which regards tort law as a device for social engineering", [74] then went on to say: "*Brown v. Merlo,* in effect, elevated this device for social engineering to the level of a constitutional doc-

69. Id. at 573.

70. *Henry v. Bauder,* 213 Kan. 751, 518 P. 2d 362, 366 (1974).

71. Id. at 371.

72. Id. at 371-372.

73. Id.

74. *Anno:* 32 A. L. R. 3d 496, 513, n. 3 (1970).

trine".[75] Justice Crockett, concurring specially, said of *Merlo:* "It impresses me as mainly concerned with rationalizations toward a desired result of repudiating their statute".[76]

In April 1974, Chief Justice Moore of the Supreme Court of Iowa said of *Merlo:* "Its reasoning is unsound".[77]

In May 1974, the Supreme Court of North Dakota found that State's guest statute contravened the North Dakota Constitution, but declined to find the North Dakota statute unconstitutional under the Fourteenth Amendment of the Federal Constitution, saying: "To this extent we disagree with *Brown v. Merlo, supra,* which held that the California statute violated both Federal and State Constitutions." [78]

In June 1974, Justice McQuade of the Supreme Court of Idaho said: "We are persuaded that the California decision in the [Merlo] case should be followed and the guest statute declared unconstitutional." [79] But Chief Justice Shepard, in a scathing dissent, said:

> The illogic of the majority decision herein has obviously been lifted from the decisions of California and Kansas. Those decisions, parroted by the majority herein, set up two strawmen, one the collusive lawsuit, and secondly the advancement of hospitality. Then all three opinions effectively destroy the strawmen and conclude therefor that an automobile guest statute is so patently unrelated to the attainment of a

75. *Cannon v. Oviatt* (Utah), 520 P. 2d 883, 886, appeal dismissed, 419 U. S. 810, reh. denied 419 U. S. 1060 (1974).

76. Id. at 889.

77. *Keasling v. Thompson, supra* at 692.

78. *Johnson v. Hassett,* 217 N. W. 2d 771 at 780 (N. D. 1974).

79. *Thompson v. Hagan,* 96 Idaho 19, 523 P. 2d 1365, 1370 (1974).

> valid stated objective that it violates either the Federal or State Constitution relating to equal protection.[80]

Chief Justice Shepard also said: "I consider the action of the majority opinion today to be an unwarranted intrusion by the Judicial Branch of Government into the area of policy determination traditionally and historically reserved for the Legislative Branch of Government." [81]

In August 1974, the Oregon Supreme Court unanimously upheld the Oregon Automobile Guest Statute and specifically rejected the *Merlo* rationale on the ground that most of the changed circumstances upon which the California Supreme Court relied were wrought by that Court itself in discarding previously recognized common law doctrines.

Also in August 1974, Chief Justice Herrmann of the Supreme Court of the State of Delaware said:

> We share the view upholding the constitutionality of guest statutes against the force of the *Merlo* rationale * * * The balancing of intangibles, such as are involved in the *Merlo* approaches, is a proper legislative function * * * The balancing of competing advantages and disadvantages is also fundamentally a legislative function * * * The appellants, and all who share increasing disillusionment with the Automobile Guest Statute under present conditions, must address themselves to the General Assembly.[83] For this Court to abolish the guest statute because of changed conditions would, in our view, amount to impermissible judicial legislation.[84]

80. Id. at 1373.

81. Id. at 1372-1373.

82. *Duerst v. Limbocker*, 209 Or. 252, 525 P. 2d 99 (1974).

83. The majority of critics of guest statutes have advocated legislative repeal, not judicial repudiation. See e.g., *Keasling v. Thompson, supra*, at 694.

Delaware rejected *Merlo*, unanimously.

The score to date is *Merlo* 7—guest statutes 13.[85]

The *Merlo* arguments, relied upon so heavily by the Appellants in this Court, have not been persuasive in the majority of the other courts in which those arguments have been made with respect to the constitutionality of automobile guest statutes.[86] Appellants here use the *Merlo*

84. *Justice v. Gatchell, supra*, at 102-103.

85. The following guest statutes have been upheld: *Hill v. Garner*, 277 Or. 641, 561 P. 2d 1016, dismissed for want of a substantial federal question, 98 S. Ct. 623 (1977); *Neu v. Grant* (10th Cir. 1977), 548 F. 2d 281; *Sidle v. Majors*, 536 F. 2d 1156 (7th Cir. 1976), cert. denied, 429 U. S. 945 (1976); *Behrns v. Burke*, S. D., 229 N. W. 2d 86 (1975); *White v. Hughes*, 257 Ark. 627, 519 S. W. 2d 70, dismissed for want of a substantial federal question, 423 U. S. 805 (1975); *Richardson v. Hansen*, 186 Colo. 346, 527 P. 2d 536 (1974); *Cannon v. Oviatt*, 520 P. 2d 883 (Utah), dismissed for want of a substantial federal question, 419 U. S. 810, reh. denied 419 U. S. 1060 (1974); *Keasling v. Thompson*, 217 N. W. 2d 687 (Iowa 1974); *Justice v. Gatchell*, Del. Supr., 325 A. 2d 97 (1974); *Tisko v. Harrison*, 500 S. W. 2d 565 (Civ. App. Tex. 1973); *Delaney v. Badame*, 49 Ill. 2d 168, 274 N. E. 2d 353 (1971); *Beasley v. Bozeman*, Ala., 315 S. 2d 570 (1975); *Brady v. Acs*, 264 Ind. 285, 342 N. E. 2d 837 (1976); *Stoehr v. Whipple*, 405 F. Supp. 1249 (D. Neb. 1976).

The following cases have held guest statutes invalid: *McGeehan v. Bunch*, 88 N. M. 308, 540 P. 2d 238 (1975); *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 538 P. 2d 574 (1975); *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975); *Thompson v. Hagan*, 96 Idaho 19, 523 P. 2d 1365 (1974); *Henry v. Bauder*, 213 Kan. 751, 518 P. 2d 363 (1974); *Brown v. Merlo, supra; Manistee Bank and Trust Co. v. McGowan*, 394 Mich. 655, 232 N. W. 2d 636 (1975); *Johnson v. Hassett*, 217 N. W. 2d 771 (N. D. 1974).

86. The Illinois Aviation-Guest Statute has also been held to violate neither the equal protection nor due process clauses of the Federal or Illinois Constitutions. *Praznik v. Sport Aero, Inc.*, 42 Ill. App. 3d 330, 355 N. E. 2d 683 (1976). The distinctions between the behavior of host and guest on an airplane and on land are far more marked than distinctions between behavior in an automobile and on land. See *Ker v. Messmer*, 96 Idaho 75, 524 P. 2d 536 (1974). The premises guest can leave the property upon

argument in the effort to have this Court declare unconstitutional, not Delaware's Automobile Guest Statute, but Delaware's Premises Guest Statute. That result can be obtained only if this Court is first willing to overrule its decision in *Silver* and declare the remainder of this country's automobile guest statutes unconstitutional in the face of thirteen state courts declining to do so.

In *Merlo*, the California Supreme Court purported to distinguish *Silver* on the grounds that it was decided 40 years earlier and circumstances had changed.[87] The California Supreme Court implied that this Court would overturn *Silver*, if given the opportunity.[88]

Not only was the California Supreme Court presumptuous on this point, it was incorrect. At the time the *Merlo* opinion was issued, there existed the year-old ruling of this Court in *Retza v. Fortune*,[89] in which an appeal from an Ohio decision upholding the Ohio Guest Statute was dismissed for want of a substantial Federal question. The California Supreme Court was either unaware of that ruling or chose to ignore it.[90]

In 1928, this Court upheld the Connecticut decision in *Silver*. Chief Justice Wheeler of the Connecticut Su-

86. (Cont'd.)
notice of negligence or hazardous activity. In an airplane or automobile, the host is in control whereas the landowner need not be present and cannot control all areas of the premises. See *Thompson v. Hagan, supra.* Of course, if the departure of the premises' guest is thwarted or blocked, he would then have a cause of action beyond the scope of the guest statute.

87. Delaware remained constant during the same period. *Gallegher v. Davis, supra; Justice v. Gatchell, supra.*

88. 506 P. 2d 217, n. 4.

89. 409 U. S. 810 (1972). Of course, it is recognized that three years later the Ohio Supreme Court rendered its Guest Statute unconstitutional. *Primes v. Tyler,* 43 Ohio St. 2d 195, 331 N. E. 2d 723 (1975).

90. The dismissal for want of a substantial Federal question preceded *Hicks v. Miranda,* 422 U. S. 332 (1975), by three years. See footnote 92, *infra.*

preme Court, in his dissent, found *Merlo*-type arguments persuasive and would have had the Court hold the Connecticut statute contravened the equal protection clause of the Fourteenth Amendment of the United States Constitution. Those *Merlo*-type arguments were made to this Court in *Silver* and were rejected by it. This Court upheld the constitutionality of the Connecticut statute which is almost identical to that enacted by the General Assembly of Delaware.

This Court has passed on the constitutionality of automobile guest statutes on five occasions. In 1928,[91] it ruled such statutes constitutional. In 1972,[92] 1974,[93] 1975,[94] and 1976,[95] it reaffirmed that decision by finding appeals from state court decisions upholding the constitutionality of automobile guest statutes failed to present substantial Federal questions. As the Courts in *Tisko v. Harrison*[96] and *Cannon v. Oviatt*[97] point out, both Texas and Utah retain the traditional common law tort concept that the status of a person determines the duty owed to him. Thus, the Texas and Utah statutes do not single out the automobile guest alone, and treat him differently from all other guests, as did California's.

91. *Silver v. Silver, supra.*

92. *Retza v. Fortune, supra.*

93. *Cannon v. Oviatt, supra.* The case before this Court does not present the concern expressed by Mr. Justice Brennan in the *Sidle v. Majors* dissent with respect to the interaction of *Hicks v. Miranda, supra* (holding that state and lower federal courts are bound by this Court's summary disposition of appeals), and *Cannon v. Oviatt* (appeal dismissed for want of substantial federal question) because this case only peripherally involves automobile guest statutes and is not the one in which to "give plenary consideration to the constitutional issue that has stirred such conflict among state and lower federal courts." 429 U. S. at 951.

94. *White v. Hughes,* 257 Ark. 627, 519 S. W. 2d 70 (1975), appeal dismissed, 423 U. S. 805 (1975).

95. *Sidle v. Majors,* 429 U. S. 366 (1976).

96. *Tisko v. Harrison, supra.*

97. *Cannon v. Oviatt, supra.*

Delaware, like Texas, Utah and many other states, continues to recognize the traditional common law tort doctrine that the status of a person determines the duty owed to him. Delaware continues to recognize the distinction between business visitors and licensees. Delaware continues to recognize interspousal immunity.[98]

The Delaware guest statutes do not single out the premises guest alone, and impose upon him a burden different from that imposed on other guests, as was the case in California. The Delaware Automobile Guest Statute applies to guests in boats and on airplanes, as well as in motor vehicles.[99]

The legal background against which the *Merlo* classification was measured is distinguishable from the legal background against which the Delaware statutory and common law classifications must be measured. That distinction, standing alone, shows that *Merlo* is not applicable to Delaware.[100]

98. Delaware has modified the judge-made rule of parental immunity holding that it is not applicable to the extent of a parent's liability insurance coverage. *Williams v. Williams,* Del. Supr., 369 A. 2d 669 (1976). But cf. *Strahorn v. Sears, Roebuck & Co.,* Del. Super., 123 A. 2d 107 (1956) which the *Williams* Court specifically said it did not overrule. The Delaware Supreme Court has also abandoned the judge-made doctrine of charitable immunity. *Durney v. St. Francis Hospital, Inc.,* Del. Super., 83 A. 2d 753 (1951).

99. *Justice v. Gatchell, supra.*

100. A prime reason running throughout the cases which have relied on *Merlo* and declared the automobile guest statute unconstitutional is the "advent of widespread automobile liability insurance". *Thompson v. Hagan, supra* at 1370. There is no compulsory liability insurance for homeowners as there is for automobile owners. See e.g., 21 *Del. C.* § 2902. Thus, as opposed to the rationale overruling the automobile guest statutes, without limited liability, a homeowner would have to bear directly the risk of his negligence toward guests whereas the automobile owner's risk is shifted elsewhere by mandatory insurance. Moreover, automobile travel is inherently more hazardous than mere entry into another's home or onto his premises.

Finally, after *Silver,* and until *Merlo,* there was essentially quiet in the land on the issue of the constitutionality of automobile guest statutes.[101] *Merlo* admittedly has created the furor. Some states upon reconsideration have declared their automobile guest statutes unconstitutional,[102] while others have observed constancy.[103] Notwithstanding the result in any given case across this Nation, it is clear that the issue is being reviewed as a matter of social and economic policy in the state courts and state legislatures. That is as it should be; the issue should be resolved in the States, not in the United States Supreme Court.

The States constitute 50 experimental laboratories and as this Court said in *Dandridge v. Williams,*[104] those 50 laboratories are free to experiment and are given great latitude in the realm of social, economic and political values.

The Delaware Supreme Court has upheld the constitutionality of Delaware's Automobile Guest Statute, which is not before this Court, as well as the constitutionality of the Delaware Premises Guest Statute, which is. Delaware's General Assembly, which in the latter case decided to codify the common law, is the proper forum to consider its repeal of the Premises Guest Statute if it decides that *Rowland* is the wise and sound wave of the future. This is as it should be in the United States.

101. Most critics address their desire for repeal to the legislatures, not to the courts. See footnote 83.

102. For example, Ohio's statute was held constitutional in *Retza v. Fortune, supra,* in 1972 but declared unconstitutional by the Ohio Supreme Court in *Primes v. Tyler, supra,* in 1975.

103. Delaware, for example, upheld its statute in 1936 in *Gallegher v. Davis, supra,* and reaffirmed that decision nearly 40 years later in *Justice v. Gatchell, supra.*

104. *Dandridge v. Williams, supra.*

CONCLUSION.

This appeal should be dismissed or the decision below affirmed because the question on which the decision depends does not present a substantial Federal question.

Respectfully submitted,

MASON E. TURNER, JR.,
ROBERT G. CAREY,
PRICKETT, SANDERS, JONES,
ELLIOTT & KRISTOL,
1310 King Street,
P. O. Box 1328,
Wilmington, Delaware. 19899
Attorneys for Appellee.

DATED: December 31, 1979.

PROOF OF SERVICE.

AND NOW, TO-WIT, this 31st day of December, A. D. 1979, I hereby certify that all parties required to be served have been served copies of Appellee's Motion to Dismiss or Affirm for Want of a Substantial Federal Question, and the accompanying brief in support of the motion, that service has been made on Appellant pursuant to Rule 33(1) by mailing three copies, by depositing them at the United States Post Office at Wilmington, Delaware, first class postage prepaid, on December 31, 1979, to Appellants' counsel of record: Harold Schmittinger, Esquire, P. O. Box 427, Dover, Delaware 19901.

PRICKETT, SANDERS, JONES,
ELLIOTT & KRISTOL
By: MASON E. TURNER, JR.,
1310 King Street,
Box 1328,
Wilmington, Delaware 19899.